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SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1961

No. 654

ILLINOIS CENTRAL RAILROAD COMPANY, - - - - - - - Appellant,

versus

CITY OF SHIVELY, KENTUCKY, - - Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

JAMES W. STITES,
LLOYD CARDWELL,
LIVELY M. WILSON,
Louisville, Kentucky,
Counsel for Appellant.

Of Counsel:
JOSEPH H. WRIGHT,
JOHN W. FREELS,
Chicago, Illinois.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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ILLINOIS CENTRAL RAILROAD COMPANY, - *Appellant,*

v.

CITY OF SHIVELY, KENTUCKY, - - *Appellee.*

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY.

STATEMENT AS TO JURISDICTION.

The appellant, pursuant to United States Supreme Court Rules 13 (2) and 15, files this its statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment of the Kentucky Court of Appeals denying appellant's request for a permanent injunction and should exercise such jurisdiction in this case.

OPINIONS BELOW.

The Chancellor of the Jefferson Circuit Court of Jefferson County, Kentucky, delivered a written opinion sustaining appellant's request for a permanent injunction. A copy of the opinion is attached hereto. Also attached hereto is a copy of the opinion of the Kentucky Court of Appeals, reported at 349 S. W. 2d 682 (Ky.), reversing the judgment of the lower court.

JURISDICTION.

The appeal herein is from a final decree by the Court of Appeals of the Commonwealth of Kentucky, denying appellant's request for a permanent injunction and dismissing the proceeding. The injunction sought to restrain the enforcement of an Ordinance of the City of Shively, Kentucky, on the ground that its enforcement denied to appellant the equal protection of the law and resulted in the taking of appellant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States, and on the further ground that it imposed penalties on appellant for doing what it is required by Federal law to do under the provisions of 49 U.S.C., § 1 (4).

The final decree appealed from was made and entered on October 20, 1961. Notice of appeal was filed in the Court of Appeals of the Commonwealth of Kentucky on November 14, 1961.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment and decree complained of, by the provisions of 28 U.S.C., § 1257 (2).

The following decisions are believed to sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

Atchison, Topeka & Santa Fe Railway Co. v. *Public Utilities Commission of California, et al.*, 346 U. S. 346, 74 S. Ct. 92, 98 L. Ed. 51;

Nashville, Chattanooga & St. Louis Railway v. *Walters, Commissioner of Highways, et al.*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949;

Vandalia Railroad Company v. *Public Service Commission of Indiana, as the successor of the Railroad Commission of Indiana*, 242 U. S. 255, 37 S. Ct. 93, 61 L. Ed. 276;

King Manufacturing Company v. *City Council of Augusta, et al.*, 277 U. S. 100, 48 S. Ct. 489, 72 L. Ed. 801.

QUESTIONS PRESENTED.

The appellee, City of Shively, Kentucky (a city of the fourth class* located just outside of Louisville), under the alleged authority of KRS 96.070, enacted an Ordinance requiring the appellant to erect crossing gates on appellant's property at three grade crossings

*Cities in Kentucky are divided into six classes according to population, with sixth class cities being the smallest and first class the largest. Each municipal corporation receives its charter under the provisions of KRS 81.040 to 81.070.

within the City of Shively. The principal questions presented by this appeal are:

(a) Does not KRS 96.070, as construed by the Kentucky Court of Appeals, result in a taking of appellant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

(b) Does not the Ordinance of appellee, City of Shively, Kentucky, directing the appellant, Illinois Central Railroad Company, to erect crossing gates on its own property and at its sole expense, result in an arbitrary exercise of the police power by appellee and a taking of appellant's property without due process of law, in violation of the Fourteenth Amendment to the Constitution of the United States?

(c) Does not the Ordinance that does and can only affect the appellant, deny to it the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States?

(d) Can appellee, by the Ordinance in question, impose penalties on appellant for doing what it is required to do by the provisions of 49 U.S.C., § (1) (4)?

STATUTES INVOLVED.

The alleged authority for the Ordinance enacted by appellee is KRS 96.070, which reads as follows:

> "Fourth-class city may grant right of ways to utilities; conditions.
>
> "The legislative body of any city of the fourth class may grant right of ways over the public streets or public grounds of the city to any utility company, on such conditions as seem proper, shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars. The legislative body may compel any railroad company to erect and maintain gates at street crossings and prevent railroads from obstructing public ways of the city, and fix penalties for the violation of these provisions. Nothing in this section shall prevent any property owner whose property abuts on a street on which a railroad is granted a right of way from recovering from the railroad any damage done to his property by the occupation or use of the street by the railroad."

The Ordinance enacted pursuant to this statute reads as follows:

> "ORDINANCE No. 1001
>
> "AN ORDINANCE REQUIRING THE ERECTION AND MAINTENANCE OF GATES AT DESIGNATED STREET CROSSINGS WITHIN THE CITY LIMITS OF THE CITY OF SHIVELY.
>
> "THE CITY COUNCIL OF THE CITY OF SHIVELY, KENTUCKY, DO ORDAIN AS FOLLOWS:
>
> "*Section 1.* That any and all railroad companies, corporations or persons engaged in operat-

ing or in control of any line of railroad extending over and across Wathen's Lane, Sanders (Sadie) Lane and Gagel Avenue, streets within the city limits of the City of Shively, shall, at each of the said crossings where locomotives or trains are run, provide and maintain and properly operate safety gates of the design and mechanism suitable for the protection of persons riding, driving or on foot from trains and locomotives approaching said street crossings.

"*Section 2.* That any railroad company, corporation or person failing to provide and maintain and operate the safety gates as required by the provisions of the foregoing section shall be fined not less than Ten ($10.00) Dollars, nor more than Fifty ($50.00) Dollars for each day they fail to do so.

"*Section 3.* That the safety of the citizens of Shively and vehicular traffic using said street crossings within the city limits of the City of Shively requires the maintenance of said gates at said street crossings.

"*Section 4.* This ordinance shall take effect on and after its passage and publication."

Also involved are certain provisions of the Transportation Act, 49 U.S.C., § 1 (4), which read as follows:

"It shall be the duty of every common carrier subject to this chapter to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers

by railroad subject to this chapter to establish reasonable through routes with common carriers by water subject to chapter 12 of this title, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

STATEMENT OF THE CASE.

Appellee, the City of Shively, Kentucky, is a municipal corporation of the fourth class, and is in reality a suburb of the City of Louisville. Appellant's right-of-way for its main line of tracks leading out of Louisville passes through the corporate limits of appellee and is presently intersected and crossed by three of appellee's streets, viz: Wathen Lane, Sanders (Sadie) Lane and Gagel Avenue.

Appellant, or its precedessors, has owned its right-of-way in its present location since September 15, 1897, many years before appellee came into existence. Only in comparatively recent years has appellee extended its corporate limits to include appellant's right-of-way. At present the East line of appellant's right-of-way is substantially the same as the Eastern line of appellee's corporate limits.

Appellant operates no scheduled passenger trains over said right-of-way but does operate two freight trains per day each way.

Following a much-publicized accident at Gagel Avenue—the only serious accident at any of the three crossings in many years—appellee passed an Ordinance that in substance required appellant to erect safety gates on its property at each of the three street crossings on appellant's right-of-way. Appellant was required to bear the entire expense of the installation, or approximately $45,000, plus an annual expense of maintenance and operation of approximately $2,400.

While the Ordinance speaks in general terms, it can and does apply only to appellant. The Ordinance is penal in nature and provides for a fine of not more than $50 for each day a train is operated without the required safety gates.

Upon the threatened enforcement of this Ordinance by a criminal prosecution, appellant filed this action in the Jefferson Circuit Court requesting a permanent injunction to restrain and enjoin appellee from enforcing the provisions of the Ordinance and requesting the Court to declare said Ordinance null and void, on the grounds that it denied to appellant the equal protection of the law and resulted in the taking of appellant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

The Federal question, presented by the allegations of the complaint, was decided in favor of appellant's contention in the Jefferson Circuit Court, when the

Court concluded that the enforcement of the Ordinance "* * * would unconstitutionally deprive the railroad of its property without due process of law, constitute a direct and confiscatory burden on interstate commerce, and deny plaintiff the equal protection of the law."

The Court of Appeals of Kentucky reversed the lower court and sustained the validity of the Ordinance.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL.

I. The Statute as Construed Violates the Fourteenth Amendment to the Constitution of the United States.

Since the decision of this Court in the case of *Nashville, Chattanooga & St. Louis Railway Co. v. Walters, Commissioner of Highways, et al.*, 294 U. S. 405, 55 S. Ct. 486, 79 L. Ed. 949, it has been recognized that a railroad cannot be required to pay the entire cost of grade crossing eliminations. It is also evident that the principles underlying this opinion are equally applicable to other types of railroad grade crossing protection.

The construction of KRS 96.070 by the Kentucky Court of Appeals in this case flies in the face of that ruling. The evidence shows that appellant has owned its right-of-way in its present location for many years. It received no grant from appellee to construct its tracks on or across any of the public ways involved here. On the contrary, it granted to appellee the easements for the three streets at which the appellee now seeks to require appellant to erect crossing protection

devices. Its railroad was there long before there were any crossings or, indeed, before there was any city of Shively.

The Kentucky Court of Appeals ignores the very material distinction between the right of a municipality to control the use of its public ways when the railroad occupies the streets under a grant or franchise from the City and the situation involved here, where the railroad owns its right-of-way and has granted easements across it to the City. Where the railroad is granted the right to occupy public streets with its tracks it is not unreasonable that the City should have the power to require the railroad itself to provide safety devices. There is *quid pro quo*, a value received. In the case at bar the facts are completely different. The City has given nothing. The crossings involved were granted by the railroad over its right-of-way. To require appellant to erect . . maintain crossing protection devices under these circumstances is quite another matter. This is particularly true where the Ordinance recognizes that its sole purpose was for the protection of "the citizens of Shively and vehicular traffic." It is just such an appropriation of the property of appellant that this Court condemned in the ***Walters* case.**

It is well recognized that a statute valid as to one set of facts may be invalid as to another, or that a statute valid when enacted may become invalid by a change in the conditions to which it is applied. We submit that the statute (KRS 96.070), when applied

to the facts of this case and as now construed by the Kentucky Court of Appeals, is clearly invalid.

In *P. C. C. & St. L. Ry. Co.* v. *Crown Point*, 146 Ind. 421, 45 N. E. 587, 35 L. R. A. 684, quoted with approval in *Chesapeake & Ohio Ry. Co.* v. *D. O. Harmon*, 153 Ky. 669, 156 S. W. 121, the question was presented as to whether or not a town could require a railroad to maintain watchmen and gates at its own expense at public crossings under a general power to regulate the highways within the town. The Court said (at p. 588):

> "It may be admitted that incorporated towns have the power to regulate public travel upon the streets so as to make their use reasonably safe at all times for those who go upon them, and to enact ordinances for the protection of health, life, and property. It is true that the persons and property of those who attempt to cross a railroad track are subject to risk. The question, however, is not whether the incorporated town has a right to protect its inhabitants or their property, *but whether it has the right to compel the railroad company to do so at its own expense.* The propositions are essentially different." (Emphasis added.)

As this Court stated in the recent case of *Armstrong* v. *United States*, 364 U. S. 40, at page 49:

> "The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

The same guarantees, of course, protect appellant from similar attempts by the State.

There is nothing in KRS 96.070 that implies that a city may throw the whole cost of constructing gates on to the railroad company. On the contrary, the implication of the statute and the requirements of due process require that the cost should be borne by the persons benefited. Here the ordinance is specific that the safety of the citizens of Shively and vehicular traffic are the concern of the appellee, and not the safety of the railroad. Here, appellee is undertaking to stretch a statute passed before there were any automobiles in Kentucky to authorize it to require appellant, on peril of daily fine, to construct gates on its own right-of-way; this to protect traffic that did not exist in 1893, and in the face of a steady decline in use of the railroad. To say that this deprives the railroad of its property without due process of law and denies it the equal protection of the laws is, we submit, to put the matter mildly.

II. The Action of Appellee Is Not Justified as an Exercise of the Police Power.

Appellee seeks to justify the construction of the statute adopted by the Kentucky Court of Appeals by contending that its action was a proper exercise of its police power. While we would not deny appellee the right to exercise its police power in a proper case, even that power is subject to the constitutional limitation that it not be exercised arbitrarily or unreasonably.

The facts of each case determine the validity of the exercise.

In the instant case, in addition to the very material fact that appellant owned its own right-of-way, and that the streets in question were simply easements over it, it was shown that appellant was making ever diminishing use of its tracks through the city and that in recent years the number of automobiles using the crossing had increased over 60%. It was never more true than here that

> "* * * The railroad has ceased to be the prime instrument of danger and the main cause of accidents. It is the railroad which now requires protection from dangers incident to motor transportation." *N. C. & St. L. v. Walters*, 294 U. S. 405, p. 422.

If in the *Walters* case the requirement that the railroad pay 50% of grade crossing improvement was held to be unreasonable, then *a fortiori* the attempt by appellee to impose the entire cost of such improvement on appellant is unreasonable. The recent case of *Atchison, Topeka & Santa Fe Ry. Co. v. Public Utilities Commission of California, et al.*, 346 U. S. 346, affirms these principles.

In answer to appellant's argument that the ordinance is unreasonable, the Kentucky Court of Appeals quotes from *Chesapeake & Ohio Railway Co. v. Maysville*, 24 K. L. R. 615, 69 S. W. 728, decided in 1902, to the effect that "what the legislature expressly authorized cannot be set aside by the courts because they

deem it unreasonable." This is not and cannot be the law as applied to this case.

The police power does not rise above the Constitution. As said by Mr. Justice Brandeis in *N. C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 415:

> "The police power is subject to the constitutional limitation that it may not be exerted arbitrarily or unreasonably."

There are two very material differences between this case and the *Maysville* case, upon which the Kentucky Court of Appeals relies. As this Court recognized, a statute valid in 1902 could become invalid by reason of the different circumstances shown to exist in this case and which the Kentucky Court of Appeals refused to consider. In addition, in the *Maysville* case the City had granted the railroad the right to occupy the city streets and it was not unreasonable to require the railroad, under those circumstances, to provide crossing protection. As we have pointed out, the reverse of that situation was shown to exist here.

In the recent case of *City of Winston-Salem* v. *Southern Ry. Co.* (N. C.), 105 S. E. 2d 37, the city undertook to force the railway company, at its sole expense, to rebuild a trestle so as to increase the clearance for a wider street. In deciding that the city could not do this under pretense of the exercise of its police power, the Court examined a great number of cases and discussed the philosophy of many of the decisions. We quote only a part of the opinion (p. 47):

"While numerous decisions hold that a railroad company may not be relieved of the expense of making crossing improvements because it will derive no benefit from the improvement, nevertheless, in most of the cases cited by the City it is manifest that the company stood to benefit substantially from the overpass, underpass, or other improvements required to be constructed. The benefits accruing to the railroads came in the form of minimized crossing accidents and reduced tort liability of the companies. The improvements also facilitated faster movement of trains and shifting operations in congested areas. See Durham v. Southern R. Co., *supra*, 185 N. C. 240, 117 S. E. 17; Erie R. Co. v. Board of Public Utility Commissioners, *supra*, 254 U. S. 394, 41 S. Ct. 169, 65 L. Ed. 322.

* * * * * * *

"But conditions have changed. The benefits and conveniences derived by the vehicular traveling public from improved crossing facilities are no longer shared to any appreciable extent by the railroads. The horse-drawn vehicles which in the early days of railroading served as great feeders and suppliers of business for the railroads have vanished from the scene. And the impact of motor vehicular transportation on the business of the rails has undergone a vast change since the expansion in recent years of our State and Federal systems of public highways and the concurrent development of the processes of mass production of improved motor vehicles. These vehicles—passenger automobiles, long and short-haul busses, and large van-type motor trucks—are part of the country's fabulous motor transportation system

which, operating both as private and public carriers of passengers and freight on our nationwide improved system of public highways, in recent years has taken from the railroads large volumes of their former business. These motor vehicles are now real competitors of the rails. No longer do they serve to any appreciable extent as feeders for the rails. They take their commodities and passengers to final destination. They are handling a large percentage of both short and long-haul freight that otherwise would move by rail.

"Under the ordinary competitive conditions now prevailing between the rails and motor transport where, as here, the railroad company derives no benefit from the proposed crossing improvement, the imposition on the company of the costs of the project may not ordinarily be justified to any degree on the theory that the costs will be absorbed in the rate structure and passed on to the general public. This is so because rail rates, like other competitive price structures, are subject now in a real sense to the economic law of diminishing returns. And by reason of prevailing conditions under which the rails are in a losing competitive fight for business with other modes of transportation, the costs of crossing improvements may not be built into the rate structures and passed on effectively to the shipping public as in former times. Besides, and assuming *arguendo* that the costs of these improvements might still in some instances be absorbed in railroad rate structures and passed on to the ultimate consumers, even so, there would be an element of basic unfairness in such process where, as here, the company stands to receive no direct benefit from the

project, since the costs would fall only on consumers of goods and on passengers moving by rail, in exoneration of the vast volume of commodities and passengers moving by motor and other competitive modes of transportation."

The Court goes on to point out the numerous changed conditions such as the increase in motor vehicle registrations and the increase in population and the "growing legislative trend throughout the country to relieve the railroads of some or all of the costs of making crossing improvements."

This same legislative purpose has been expressed by the Kentucky legislature in an Act relating to the elimination of railroad highway crossings, Chapter 78, Acts of 1958. The title to that Act states:

> "AN ACT relating to the elimination of hazards at railroad-highway crossings by means of grade separation structures or *automatic warning devices* and providing for allocation and apportionment of the costs of construction, installation and maintenance thereof."

The first sentence of the Act says (in part):

> "The entire constructions costs of projects for the elimination of hazards of railroad-highway crossings, * * * and the relocation of highways to eliminate railroad grade crossings which may be paid for in whole or in part from state funds * * * shall be allocated between the railroad involved and the governmental unit or units involved in the same ratio as the net benefit received by such railroad from the project bears to the net

> benefit accruing to the public using the highway, and in no case shall the net benefit to any railroad or railroads be deemed to be more than 10% of the total benefit resulting from the project."

The same rule applies to Federal-Aid highway projects (58 Stat. 838).

The opinion of the Kentucky Court of Appeals brushes aside the *Walters* case, as well as other grade crossing elimination cases with the simple statement that "they have no application to the case at bar." Certainly grade crossing elimination arises under the police power as does the only excuse offered for the adoption of the ordinance by appellee here. Both questions arise under the power to deal with the public health, safety or morals. Both involve the reasonableness of the action taken by the public authorities. The two situations are treated together by the Legislature in Chapter 78, Acts of 1958. Both involve the changing fact situation to which the law must be applied and which the Kentucky Court of Appeals refused to recognize.

We respectfully urge that the principles applied in the *N. C. & St. L.* v. *Walters* case are applicable *pari passu* to the facts here involved.

III. Appellee Has No Authority to Impose a Fine on Appellant for Doing What Federal Law Requires.

It will be noted that the ordinance of appellee is couched in terms of a criminal offense. The city has not attempted to proceed by civil means, as by mandatory injunction or condemnation, but says, in effect, that appellant is guilty of a crime for operating its trains over crossings where crossing gates are not provided. The penalty, therefore, is imposed for the operations of a railroad.

Under the Transportation Act the railroad company is required by Federal law to maintain adequate services to shippers. It obviously cannot do this without operating its trains. We are thus placed in the position that if we stop operating our trains in obedience to the ordinance, we incur the penalties of the Federal law; while if we obey the Federal law and continue to operate, we incur the penalties fixed by the ordinance.

In *Southern Ry. Co.* v. *Reid*, 222 U. S. 424, a North Carolina statute imposed a penalty against a railroad company for refusing to receive freight "whenever tendered" of $50 for each day's delay. A shipment was tendered to the Southern Railway for delivery off of its line to a point for which no rates had been published. The Southern refused the shipment until it could communicate with the connecting carriers and file and publish a proper rate, as required by the Hepburn Act. The Supreme Court found that the

Southern had properly complied with the requirements of the Federal law, and said (p. 442):

> "* * * By these provisions Congress has taken possession of the field of regulation, with the purpose, which we have already pointed out, to keep under the eye and control of the Commission the rates charged and the action of the railroad in regard to them, to secure their reasonableness and to secure their impartial application. The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the statute requires him to do, and punishes disobedience by successive daily penalties."

See, also, *C. & C. R. R. Co.* v. *Varnville Co.*, 237 U. S. 597, 604.

CONCLUSION.

The interpretation of KRS 96.070 by the Kentucky Court of Appeals renders the statute unconstitutional under the Fourteenth Amendment and approves an ordinance of appellee that is clearly an arbitrary and unreasonable exercise of its police power. These are substantial Federal questions which this Court has jurisdiction to review under the provisions of 28 U.S.C. 1257 (2).

Respectfully submitted,

JAMES W. STITES,
LLOYD CARDWELL,
LIVELY M. WILSON,
Louisville, Kentucky,
Counsel for Appellant.

Of Counsel:
JOSEPH H. WRIGHT,
JOHN W. FREELS,
Chicago, Illinois.

APPENDIX

APPENDIX

JEFFERSON CIRCUIT COURT

CHANCERY BRANCH, FIRST DIVISION

CR 32031

ILLINOIS CENTRAL RAILROAD COMPANY, - - *Plaintiff,*

v.

CITY OF SHIVELY, KENTUCKY, - - - *Defendant.*

OPINION.

In this action the plaintiff Railroad seeks to enjoin as unconstitutional an ordinance of Shively, a City of the Fourth Class, requiring it to erect and maintain safety gates for traffic at the three crossings of the Railroad over Wathen's Lane, Sanders (Sadie) Lane and Gagel Avenue.

A large map of Shively and some of the surrounding territory has been filed as an Exhibit, and for the convenience of the Court of Appeals the writer has circled the three crossings with a red pencil.

The ordinance makes no provision for financial contribution by defendant City, nor does it give any grace period, and provides penalties of from $10 to $50 per day for noncompliance.

Because of the serious claim of unconstitutionality, apparently made in good faith, the allegation of the amended complaint that the gates would cost $45,000.00 plus $2,400.00 annual maintenance, and the daily penalty provisions, this Court issued a temporary injunction to preserve the status quo pending a trial on the merits. On April 8, 1958, the

Court of Appeals entered an order overruling a motion to dissolve the temporary injunction, apparently, likewise, without ruling on the merits.

The case was tried in chief on June 19, 1958, at which time the written interrogatories addressed by plaintiff to defendant, not having been answered, were taken as true (subject to relevancy and competency) and defendant City introduced witnesses as to traffic counts made within recent weeks 6:00 A.M. to 12:00 midnight on a number of different days, at each of the three crossings, both of motor vehicles using the three designated roads, and of plaintiff's trains (including switching movements) through Shively. This proof has not yet been written up, but satisfied the writer that the volume of "suburban" (not necessarily Shively) traffic taken together with the number of trains was sufficient to require crossing gates for the safety of the substantial vehicular traffic on the cross roads. This conclusion is arrived at in spite of testimony of only a single serious accident in recent years at any one of the crossings: —a fatal night-time accident to irresponsible teenagers which occurred but a few months before (and was the inspiration of) the enactment of the ordinance.

The case was submitted for decision on the briefs filed in the Court of Appeals on the motion to dissolve. A number of authorities are cited, all of which have been read, but of which only a few are closely in point. It is not considered necessary to distinguish them all.

Defendant City chiefly relies on C&O Ry Co. v. City of Maysville (1902—Ky) 69 SW 723 (not in Kentucky Reports). The Court of Appeals there affirmed the trial Court in upholding a City ordinance requiring the installation and operation of safety gates at four designated intersections of its line, Maysville being also a Fourth Class City, under Sec. 3490, Subsec. 5, Ky. Stat. (now KRS 96.070 It would appear that defendant City's ordinance was

modeled closely on that upheld in the cited case. This case would appear decisive of the parties' rights unless it has been rendered obsolete by progress and/or the Legislatures' and the Courts' awareness thereof.

In L&N RR Co. v. Faulkner (Ky), 307 SW 2d 196, the Court held that because of changed conditions since its enactment, KRS 277.330, making the killing of livestock by a railroad prima facie evidence of negligence, had become unconstitutional.

In NC&St.L. R. Co. v. Walters (1935, Brandeis, J.), 294 U.S. 405, 79 L.Ed. 949, 55 S.Ct. 486, the Chancellor had set aside an apportionment against the railroad, pursuant to State law, of ½ the cost of a grade elimination project on voluminous evidence introduced by the railroad that the crossing was in a hamlet of 1800 population, safely protected (insofar as local traffic was concerned) by a flashing signal, that the improvement was for the benefit of the interstate highway system, to carry automobile passengers, interstate and commercial trucks interstate in disastrous competition with the railroad. The Tennessee Supreme Court had reversed, without, in Justice Brandeis' view, weighing the evidence which had formed the basis of the Chancellor's decision, and the case was reversed with instructions for them to do so.

Counsel for plaintiff also rely on Senate Bill No. 181, Acts 1958, c. 78, placing a 10% ceiling on the assessment against railroads for projects for the elimination of railroad-highway crossings, including the separation *or protection* of grades at crossings--paid in whole or in part from State funds, and the similar provision in Sec. 5(b) of the Federal-Aid Highway Act of 1944 (58 Stat. 838). While it is true that none of the three roads here involved receive State aid, the new Act states the policy of the Legislature that it is unfair to assess more than 10% of the cost of grade protection against the railroad.

The proof introduced by plaintiff indicates that Shively is in a healthy, financial condition, and in 1956 levied only 30¢, and in 1957 only 40¢, of the $1.00 maximum tax rate.

Taking together the recent Faulkner case from the Court of Appeals, the 1935 Walters case from the Supreme Court, and the 1958 Kentucky and 1944 Federal Acts setting up a yardstick for the railroad's contributions toward grade-crossing protection, it is the opinion of this Court that to follow C&O R. Co. v. Maysville, and enforce to the letter KRS 96.070, in the light of changed conditions, would unconstitutionally deprive the railroad of its property without due process of law, constitute a direct and confiscatory burden on interstate commerce, and deny plaintiff the equal protection of the law.

A judgment may be tendered on notice, making permanent the injunction against the enforcement of the ordinance, and adjudging plaintiff its costs against defendant.

July 2, 1958.

/Sd/ Macauley L. Smith
MACAULEY L. SMITH, JUDGE

cc: Judge James W. Stites
Judge Raymond C. Stephenson

COURT OF APPEALS OF KENTUCKY

MAY 12, 1961

CITY OF SHIVELY, KENTUCKY, - - - *Appellant,*

v.

ILLINOIS CENTRAL RAILROAD COMPANY, - - *Appellee.*

Appeal from Jefferson Circuit Court,
Honorable Macauley L. Smith, Judge.

OPINION OF THE COURT BY JUDGE STEWART—REVERSING.

In this action appellee, Illinois Central Railroad Company, sought in circuit court to prohibit the enforcement of an ordinance of appellant, city of Shively, a fourth-class city, which required appellee to erect and maintain safety gates for traffic at three crossings of the railroad over Wathen's Lane, Sanders (sometimes called Sadie) Lane, and Gagel Avenue, all of which crossings are located within appellant's city limits. The ordinance went into effect immediately upon passage, leaving no grace period; contained penalties of $10.00 to $50.00 per day for noncomplaince; and made no provision for financial contribution by the appellant city. The ordinance was drafted in conformity with the terms and conditions of KRS 96.070, which is set forth in its entirety hereinafter.

A temporary injunction, issued pending trial, was sustained by the Court of Appeals. Trial was held in June, 1958, and on July 8, 1958, the judgment entered decreed the ordinance was void and appellant and its officers and agents

were permanently enjoined from carrying the ordinance into effect.

The opinion of the trial court stated that "the volume of 'suburban' (not necessarily Shively) traffic taken together with the number of trains was sufficient to require crossing gates for the safety of the substantial vehicular traffic on the cross roads." However, the lower court concluded that, in the light of the trend of recent legislation and recent cases, particularly those of the Supreme Court of the United States, and because conditions have radically changed in the use of highways and railroads by the general public, KRS 96.070 as interpreted in Chesapeake & Ohio Ry. Co. v. Maysville (1902), 69 S. W. 728, should not be enforced to the letter, for to do so would "unconstitutionally deprive the railroad of its property without due process of law, constitute a direct and confiscatory burden on interstate commerce, and deny it the equal protection of the law."

Appellant relies upon KRS 96.070 to uphold the validity of the ordinance, which statute reads as follows:

> "The legislative body of any city of the fourth class may grant right of ways over the public streets or public grounds of the city to any utility company, on such conditions as seem proper, (and) shall have a supervising control over the use of same, and shall regulate the speed of cars and signals and fare on street cars. The legislative body may compel any railroad company to erect and maintain gates at street crossings of the city, and fix penalties for the violation of these provisions. Nothing in this section shall prevent any property owner whose property abuts on a street on which a railroad is granted a right of way from recovering from the railroad any damage done to his property by the occupation or use of the street by the railroad."

In Chesapeake & Ohio Ry. Co. v. Maysville, cited above, an ordinance was considered and upheld that was identical for all practical purposes with the one in question. Under that ordinance Maysville, a fourth-class city, required the railroad involved in that case to construct, maintain and operate safety gates at four streets which crossed over the railroad. When the ordinance was attacked on the ground that the city had no authority to enforce it, this Court, in an opinion handed down by it, said: "Subsection 25 of section 3490 of the Ky. Statutes (now KRS 96.070) which is a provision of the charter of cities of the fourth class, to which appellee belongs, expressly provides that the board of counsel may compel any railroad to erect and maintain gates at any and all street crossings. It is clear that under this provision of the charter the city counsel were authorized to adopt the ordinance complained of."

Under the undisputed factual situation presented, we believe there can be no doubt that the ordinance under consideration was enacted pursuant to the police power of the city of Shively as delegated to it by the Legislature under KRS 96.070. Furthermore, this same type of ordinance adopted by a city of the same class in conformity with the statute was construed and upheld by this Court in the case of Chesapeake & O. Ry. Company v. City of Maysville, 69 S. W. 728. We have found no decision, and appellee has produced none, which would authorize this Court to hold that KRS 96.070 does not empower the city of Shively to adopt the ordinance and enforce it in accordance with its terms and conditions.

Appellee, however, advances two arguments why, under present conditions, it should not be compelled, at its sole expense, to erect and maintain the safety gates. It points out that the original enactment upon which the ordinance is based first made its appearance in our statutes in 1893, back in the horse-and-buggy days. It was not unreasonable

before the advent of the automobile and the motor truck to assume that a railroad could pass the costs on, through its rate structure, to the very people who were to a great extent benefited by a crossing improvement. However, under the ordinary competitive conditions now prevailing between all railroads and other modes of transportation, the costs of crossing improvements may not be absorbed into the rate structure and passed on effectively to the shipping public as in former times. Therefore, the plight of the railroads in these times, when their income is steadily diminishing, has become such that fairness and justice dictate that the outlay for crossing improvements should be shared by the unit of government which directly profits from the advantage received.

The other contention is that the trend in the law, state and federal, has been away from casting the whole financial burden upon the railroads of constructing projects designed to eliminiate the hazards connected with railroad-highway crossings. By reference to certain statutes and the cases upholding the validity of such legislation, which statutes provide for the elimination of railroad grade crossings at costs to be borne by the railroad and the governmental unit or units involved according to a certain ratio, appellee takes the position that the city should be compelled to make a reasonable contribution to the cost of installing and maintaining the safety gates. Appellee also insists there is nothing in KRS 96.070 which would imply that a city may throw the whole expense of erecting and operating the safety gates onto appellee.

It is our view appellee's first contention is completely answered by certain principles laid down in the Maysville case cited above. The railroad in that case condemned the ordinance on the ground that it was arbitrary and oppressive and therefore an illegal and unconstitutional exercise of the police power. The Maysville opinion had this to say on these and related points:

"* * * The ordinance complained of was passed pursuant to express legislative authority, and, as was said in Hall v. Com., 101 Ky. 385, 41 S. W. 2d: 'It is a well-settled rule than an ordinance cannot be assailed as invalid merely because it may be considered as unreasonable, or as working a hardship in particular cases. In other words, what the legislature expressly authorized cannot be set aside by the courts because they deem it unreasonable.' In the case of Com. v. Fowler, 96 Ky. 179, 28 S. W. 789, 33 L. R. A. 839, in sustaining the validity of a statute passed in the exercise of a police power, this court said: 'We cannot hold this or any law invalid for the reason simply that it violates our opinion of justice, or is oppressive, or, in our opinion, is not required or authorized by public necessity. The remedy for unwise or unjust legislation is not to be provided by the judiciary.' * * *."

This is not a grade-crossing elimination case, so that the statutes and the cases which deal with controversies arising out of the question of what the railroad or the governmental unit is to pay when hazards at railroad-highway crossings are removed by means of grade separation structures being built, have no application to the case at bar. As suggested by appellee, KRS 96.070 is silent in respect to whose liability it is, the city's or the railroad's, to meet the expense when safety gates are installed and placed in operation. However, since the statute recites that the city "may compel any railroad company to erect and maintain gates at street crossings," the implication is crystal clear that the railroad must assume the entire payment.

The lower court, upon the basis of the facts presented in this case, set forth a conclusion of law that was clearly erroneous when it held that the literal enforcement of the ordinance would "unconstitutionally deprive the railroad of its property without due process of law, constitute a

direct and confiscatory burden on interstate commerce, and deny it the equal protection of the law."

The Supreme Court of the United States has definitely ruled that compelling a railroad to install safety gates does not have the consequences the lower court envisioned. In Chicago, B. & O. Ry. Co. v. Chicago, 166 U. S. 226, it was held in effect that the expense required of a railroad in the erection of gates, and in the taking of other precautionary measures, in order that safety may be maintained in the use of a road crossing, could reasonably be considered an outlay of money the railroad must be deemed to have taken into account when it accepted "the privileges and franchises granted by the State." A pertinent statement on this same point is expressed in these words in Muggler v. Kansas, 123 U. S. 623, 628: "Uncompensated obedience to a regulation enacted for the public safety under the police power of the State is not a taking or damaging without just compensation of private property, or of private property affected by a public interest."

As a general proposition a valid exercise of the police power resulting in expense or loss of property is not a taking of property without due process of law or without just compensation, nor does it abridge the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. See McQuillin, Municipal Corporations (3d ed.), Vol. 6, secs. 24.05, 24.06.

Appellee further contends that the right of the railroad to cross a highway or street arises from the paramount legislative grant contained in KRS 277.060(1)(h), which recites that a railroad may: "Construct its road upon or across any private road, highway, street, lane or alley, and across any railroad, canal or watercourse." Appellee reasons that once this right is exercised, and the city in giving a right-of-way easement reserved no authority in its agreement with the railroad to regulate and control the tracks,

the city may not thereafter by ordinance compel the railroad (we quote the exact phrase employed in the brief of appellee's counsel) "to do something on property *it already owns.*"

This theory (and it is nothing more than that) flies in the face of KRS 96.070, which provides that a city like Shively in granting a right of way over a public street to a railroad, on such conditions as it deems proper, "* * * shall have a supervising control over the use of same * * *." A case appellee relies upon to sustain its position on this point in our opinion refutes it. We refer to the case of City of Versailles v. Kentucky Highland R. R. Co., 153 Ky. 83, 154 S. W. 388. In the opinion of that case at page 390, this language appears: "Although such parts of appellee's railroad as are affected by the ordinance are situated upon its own ground, or properly acquired right-of-way, as such right-of-way is within the corporate limits of the city, we think the city council would have the power to pass an ordinance requiring it to construct railings at the sides of its cuts, contiguous to streets or open ways of the city if deemed reasonably necessary for the safety of its inhabitants or stock owned by them." Versailles was a fourth-class city at the time the above case was decided.

The ordinance assesses a penalty for its voliation, and it is asserted this feature is invalid. Such is allowable within the purview of the statute. Appellee infers that the levying of a fine of not in excess of $50.00 (the maximum amount) for each day the railroad refuses to comply with the ordinance might place a serious restriction upon its transportation service and therefore constitute a burden upon interstate commerce. We do not believe such a result would obtain. Certainly, if the ordinance is valid, and we have held it is, we can see no harm in putting teeth in it.

A final argument is that, in the event the ordinance is upheld, it gives no time to the railroad in which to com-

ply. In the recent case of City of Louisville v. Thompson, Ky., 339 S. W. 2d 869, 873, in construing an ordinance in which no grace period was provided we said the ordinance "must be construed by necessary implication as allowing a reasonable time" to carry out its terms.

For the reasons shown we are of the opinion that the ordinance is valid and that appellee should be directed to carry out its terms.

Wherefore, the judgment is reversed.

Attorney for Appellant:

RAYMOND C. STEPHENSON,
Lincoln Bank Building,
421 West Market Street,
Louisville, Kentucky.

Attorneys for Appellee:

LLOYD CARDWELL,
JAMES W. STITES,
STITES, WOOD, HELM & PEABODY,
1212 Kentucky Home Life Building,
Louisville 2, Kentucky.